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No. 521

In the

Supreme Court of the United States.

OCTOBER TERM, 1943.

FRANKS BROS. COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner, Franks Bros. Company, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in this cause on July 27, 1943, enforcing the order of the National Labor Relations Board of October 8, 1942, directed to the petitioner, with the exception of paragraph 2 (c), and further ordering the petitioner to notify the Regional Director of the First Region of the Board in writing within ten (10) days of the Court's decree what steps it has taken to comply with said order.

Question Presented.

The sole question presented is whether an employer shall be required to bargain collectively with a union as the exclusive representative of the employees in an appropriate bargaining unit which does not, at the time of issuance of the order of the Board, represent a majority of such employees and where the loss of majority has not occurred by reason of any unfair labor practices on the part of the employer.

Petitioner's Position.

Petitioner's position is that where, according to the record in the proceeding, a union does not represent a majority of all the employees in an appropriate bargaining unit at the time of the issuance of an order of the Board and where the loss of majority was not caused by unfair labor practices on the part of the employer, the employer should not be required upon request to bargain collectively with such union as the exclusive representative of all the employees in such unit.

Statute.

The statute pertinent to this cause is the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. sections 151-166 (1940).

Statement of the Case.

This case involves the enforcement by the Circuit Court of Appeals for the First Circuit of an order of the National Labor Relations Board. A more complete statement is in

the accompanying Brief in Support of this Petition ("Statement of the Case," pp. 5-6).

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals is believed to be in conflict with the applicable decisions of this Court and more particularly with the decision of this Court in the case of *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240; 59 S. Ct. 490.

The decision embodies an important principle of federal law concerning which Circuit Courts of Appeals appear to be in conflict. It is of public importance that its spirit be not disregarded or minimized, as is done by this decision of the Circuit Court of Appeals.

Wherefore it is respectfully requested that this petition for a writ of certiorari be granted.

ARTHUR V. GETCHELL,
Attorney for Petitioner.

BENJAMIN E. GORDON,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit filed on September 13, 1943, denying petitioner's request for rehearing appears in the Original Certified Copy of Appendix to Petitioner's (Respondent herein) Brief and all Proceedings to and including November 4, 1943. The opinion of the Circuit Court of Appeals, filed on July 27, 1943, decreeing enforcement of the order of the National Labor Relations Board also appears in the Original Certified Copy beforementioned. The order of the National Labor Relations Board appears in the same copy.

Jurisdiction.

The jurisdiction of this Court is involved under Section 10 (e) of the National Labor Relations Act, 49 Stat. 449, and Sections 239 and 240 of the Judicial Code as amended, U.S.C. Title 28, Sections 346 and 347.

Question Presented.

This is stated in the petition (*ante*, p. 2).

Statute Involved.

This is stated in the petition (*ante*, p. 2).

Statement of the Case.

On June 19, 1941, a petition for investigation and certification of representatives of employees of petitioner was

filed with the First Regional Office of the respondent at Boston, Massachusetts, Case No. I-R-725, by the Amalgamated Clothing Workers of America, hereafter called the Union (Bd. Ex. 9). On July 24, 1941, the Union withdrew the said petition[1] and filed charges of unfair labor practices against the petitioner in Case No. I-C-1797, known as Case No. C-2179 before the Board (Resp. Ex. 2). The said charges alleged acts of interference by supervisory employees of petitioner on or about July 24, 1941, in violation of Section 8 (1) of the National Labor Relations Act, hereafter referred to as the "Act."

On September 27, 1941, the Union amended the aforementioned charges to allege violation by petitioner of Section 8 (1), (3) and (5) of the Act. The said amended charge alleged violation of Section 8 (1) to have occurred on or about July 21, 22, 23, 24 and 25, 1941.

The alleged violation of Section 8 (3) involved the discriminatory discharges of three employees, and the alleged violation of Section 8 (5) involved a charge of refusal to bargain on or about June 12, 1941, and at all times thereafter with the Union as the exclusive bargaining representative of the employees of petitioner (Resp. Ex. 3).

On February 28, 1942, a second amended charge was filed with the respondent by the Union. The second amended charge alleged in part that petitioner violated Section 8 (3) of the Act by discriminatorily discharging two employees and refusing to reinstate said employees up to certain dates (Bd. Ex. 2).

On March 2, 1942, the respondent issued its complaint in this proceeding. The complaint alleged that petitioner had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3) and (5) and Sec-

[1] Reference to exhibits as Board or Respondent Exhibits is to exhibits identified as such at the hearing before the Board.

tion 2 (6) and (7) of the Act (Bd. Ex. 2). Thereafter, on March 13, 1942, petitioner filed its answer denying the unfair labor practices charged and challenging the jurisdiction of the Board (Bd. Ex. 3).

A hearing was held at Lawrence, Massachusetts, from March 16 to March 24, 1942. On April 29, 1942, the Trial Examiner filed his intermediate report, finding violations of Section 8 (1) and (5) of the Act, but finding no violation of Section 8 (3), and recommending that petitioner cease and desist from such violations and take certain affirmative actions.

On May 28, 1942, the respondent granted petitioner's request to be heard in oral argument before the Board and scheduled the hearing for the purpose of oral argument on June 16, 1942. Thereafter petitioner filed exceptions to the intermediate report. Oral argument was postponed from June 16, 1942, and finally had before the respondent on June 30, 1942, and the respondent issued its decision and order on October 8, 1942.

Thereafter the respondent petitioned the Circuit Court of Appeals for the First Circuit for enforcement of its order. The cause was heard on June 2, 1943, and on July 27, 1943, a decree of the Court was entered enforcing the order of the respondent with the exception of paragraph 2 (c) and further ordering the petitioner to notify the Regional Director for the First Region of respondent in writing within ten (10) days what steps it had taken to comply with said order. On August 6, 1943, the Court ordered a stay of its decree to permit petitioner to file a petition for rehearing.

On August 23, 1943, a petition for rehearing was filed by petitioner, which was denied by the order of the Court filed on September 13, 1943. Thereafter, on September 15, 1943, the stay of decree of August 6, 1943, was further continued.

Petitioner's Position.

Petitioner's position here has been stated in the petition (*ante*, p. 2).

Argument.

The petitioner should not be ordered to bargain collectively with the Union as the exclusive representative of all the production and maintenance employees at petitioner's Lawrence, Massachusetts, plant, excluding executives, supervisors and clerical employees, because of the fact that by the time of the hearing before respondent the Union no longer represented a majority of such employees and such loss was not due to any unfair labor practices of petitioner.

A. Representation in the Unit as of March 5, 1942, the Date of Hearing Before Respondent.

The respondent found that a sufficient number of the Union's members had ceased working for the petitioner to deprive the Union, as of March 5, 1942, of its majority status (B.A. 25).[2] There is only one case which has been decided by the United States Supreme Court which has ruled squarely on this issue. In the Fansteel Metallurgical Corporation case[3] the Supreme Court stated:

> "In view of the change in the situation by reason of the valid discharge of the 'sit-down strikers' and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge

[2] Board Appendix.

[3] *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240; 59 S. Ct. 490.

66 was the choice of a majority of Respondent's employees for the purpose of collective bargaining. The Board's order properly requires Respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require Respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election."

In the Fansteel case the Board had found that Lodge 66 had a majority on February 17, 1937, and found a refusal to bargain on the part of the employer in violation of Section 8 (5) of the Act. Thereafter, because of the unfair labor practices of the employer, the employees went on strike. The loss in majority occurred thereafter by the valid discharge of sit-down strikers.

Therefore, in the instant case, even if the Circuit Court of Appeals was right in sustaining respondent's finding of a refusal to bargain as of June 12, 1941, as it did, it is the contention of the petitioner that an order to recognize and to bargain collectively with the Union as the exclusive representative of the employees is not justified by the evidence and the law.

In its findings in regard to this point the respondent referred to the Lorillard case and others decided by the Supreme Court (B.A. 26).[4] In the Lorillard case the Court in a *per curiam* decision cited the following cases as authority: *N.L.R.B.* v. *Bradford Dyeing Association*[5] and

[4] *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512; 62 S. Ct. 397.
[5] 310 U.S. 318, 339-340.

I.A.M. v. *N.L.R.B.*,[6] each of which was referred to by respondent.

It is important to note that in each of said cases cited by the Supreme Court in the Lorillard case there is a distinction from the instant case. In the Bradford case the Board considered a shift of membership from the T.W.O.C. to a union found to be company dominated, and found that, except for the unfair labor practices of the employer, the employees would have remained members of the T.W.O.C.

In the I.A.M. case the facts are that the record did not disclose any change of majority status, which immediately differentiates it from the instant case. In the I.A.M. case the petitioner was an organization that had been found to be assisted by the employer in securing a majority of the employees of the tool and die room. The Board found that a contract between the union and the employer covering the tool-room employees was invalid for that reason and for other reasons. The Board also ordered the company to bargain with another organization.

The union in that case made no showing at the hearing that a majority of the production employees had shifted to it after the employer refused to bargain with the U.A.W. Nor did it seek leave from the Court to adduce such additional evidence. But it contended that, upon receiving a notification from it after the hearing had been closed, the Board should have ordered an election or at least made an investigation.

The Court held that no prejudicial error was involved in the failure of the Board to act.

> "Where as a result of unfair labor practices a union can not be said to represent an uncoerced majority the Board has the power to take appropriate steps to the

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[6] 311 U.S. 72, 83.

end that the effect of those practices will be dissipated."[7]

Thus the I.A.M. case is not squarely in point on the instant case. In the instant case, to the contrary, the Board has found that the loss was not due to unfair labor practices.

In the Lorillard case the record did not disclose that the union had lost its majority because of loss of membership due to the fact that employees had voluntarily quit. There, after the hearing had been closed and after the Trial Examiner had rendered his report, a strike occurred. During the strike a union was formed which petitioned the Board for permission to intervene and filed a petition for investigation and certification of representatives.

The Board denied the petition to intervene. In the administration of the Act there are long delays necessarily incident to the procedure. If the Board were to permit the opening of the record on such a petition, it would necessarily involve further delays and hinder the administration of the Act. The Supreme Court held that the Board was not in error. It is respectfully submitted that the case is distinguishable from the case at bar.

The contention of respondent in this regard is also given weight by a recent decision of the Circuit Court of Appeals for the Second Circuit in the case of *N.L.R.B.* v. *Karp Metal Products Co., Inc.*, decided March 25, 1943.[8]

Another case decided by the Circuit Court of Appeals for the Second Circuit substantiates respondent's position.[9] There the respondent asked the Trial Examiner to require the union to produce its dues book showing who had paid dues and who had not. The union's by-laws pro-

[7] 311 U.S. 72.

[8] 134 Fed. (2d) 954.

[9] *N.L.R.B.* v. *National Seal Corp.*, 127 Fed. (2d), 776.

vided that default by a member in payment of dues for three months would automatically cancel membership. The Trial Examiner denied respondent's request. The Court said:

> "The examiner refused the request, and the respondent asked nothing more; it did not suggest that it wished to prove that the union had taken any action to expel the delinquent members, or that the members had declared that the union should no longer represent them. Thus the only question before us is whether the members' default ipso facto ended the union's authority. We think it did not . . . Perhaps these members' failure to pay their dues and their return to work contrary to the Union's order were evidence of a desire not to have the union represent them any longer; but that was not the inevitable conclusion, . . . if the respondent meant to prove that the representation had ended, it was obliged to go further than it suggested to the examiner. As the point was presented to him, it was bad in law and his ruling was right."

The inference is clear that the Court's decision would have been different if the respondent had presented substantial evidence of loss of majority not due to unfair labor practices.

A recent decision of the Circuit Court of Appeals for the Sixth Circuit substantiates fully the contention of respondent, *N.L.R.B.* v. *Ohio Calcium Co.*[19] In the aforesaid case there occurred a strike not caused by unfair labor practices of the employer. The union called off the strike and the employer refused to reinstate forty employees. The Board found that the said strikers were refused reinstatement

[19] 133 Fed. (2d) 721.

because of their union affiliation. In addition to ordering their reinstatement with back pay, the Board found a refusal to bargain by the employer and ordered the employer to bargain with the union upon request. The Court found that the Board's findings with regard to the discrimination against the striking employees were not supported by substantial evidence and found that the termination of the employment of the strikers by the employer was justified. The Court stated:

> "The Board's finding that at all times since February 1938, the United Brick and Clay Workers of America, Local 669, has been the duly designated representative of respondent's employees must be rejected in view of the valid change in the situation by reason of the termination of the employer-employee relationship as above stated. The filling of the positions of the striking employees with new ones removes any basis for a conclusion that after the resumption of work Local 669 was the choice of a majority of respondent's employees for the purpose of collective bargaining. National Labor Relations Board v. Fansteel Corporation, supra (Op. pp. 261, 262)."

Petitioner contends again that in the case at bar the facts bring it clearly within the rule laid down by the Fansteel case. The Board found on the uncontroverted evidence that the loss of majority occurred through no unfair labor practices. In the Fansteel case the loss occurred through a valid discharge of sit-down strikers; in the instant case through voluntary quitting of employment (B.A. 25). The difference in the reasons for termination of employment between the Fansteel case and the instant case should not in any way affect the matter, since neither of the reasons involved an unfair labor practice on the part of the employer.

In its decision in the instant case the Board stated:

> "The Respondent introduced into evidence its payroll of March 5, 1942, by which it appears, as the Respondent asserted, at oral argument, that a sufficient number of union members had left the Respondent's employ by that date to affect the Union's majority. This alleged loss of majority is not determinative of the remedy to be ordered. *We have consistently held that the only means by which a refusal to bargain can be remedied is an affirmative order requiring the Employer to bargain with the Union which represented a majority at the time the unfair labor practice was committed.*" [11]

However, respondent points out that in the Fansteel case the strike of the employees was caused by a refusal to bargain with the union, which represented a majority of the employees at that time, an unfair labor practice; that the Board ordered the company to bargain with the union, which had represented a majority of the employees at the time the unfair labor practice was committed; and that the Supreme Court *refused to enforce* the order because the majority had been lost by reason of the valid discharge of the employees.

Since at the time of the hearing the Union did not represent a majority, it would be an injustice to the employees to establish an exclusive bargaining representative for them. It is important to note that "the sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees." [12]

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[11] Italics mine; Appendix to Petitioner's (Respondent herein) Brief, pp. 25 and 26.

[12] *N.L.R.B.* v. *Virginia Electric & Power Co.*, 115 Fed. (2d) 414; 314 U.S. 469.

The Circuit Court of Appeals for the First Circuit distinguished the instant case from the Fansteel case in the following language:

> "We are of the opinion that the Fansteel case is distinguishable from the case at bar. Because of the violence of the striking employees the employer properly discharged them. *The Union, by the action of its members, forfeited its right to be recognized as the bargaining representative even though at a prior date a majority of the employees had designated it as their representative.* An act had intervened from the date upon which it could be said that the Union was the majority representative which permitted the employer to discharge a number of employees and thereby deprive the Union of its status as the majority representative." [13] (Italics mine.)

It is respectfully submitted that the last sentence of the Court above quoted is inconsistent with its decision in the instant case. In the Fansteel case the Board found that the employees involved had been discharged in violation of the National Labor Relations Act, which finding the Supreme Court held did not rest upon substantial evidence. The Act referred to by the Circuit Court of Appeals involved the right of an employer to discharge employees for cause. It is submitted that, where the loss of majority occurs from the exercise of an employer's right, it can be no stronger or more valid than where the loss of majority occurs by reason of employees' voluntarily quitting their employment. The intervening act in the instant case was the voluntary cessation of employment. There is not an iota of evidence in the record that this cessation of employment was caused by any wrongful actions of the re-

[13] Certified Copy of Appendix to Petitioner's Brief, etc., p. 123.

spondent. There is a specific finding by the Board that a sufficient number of Union members had left the petitioner's employ by the date of the hearing to affect the Union's majority.

If the language used by the Circuit Court of Appeals in distinguishing the Fansteel case, by stating that the union, by the action of its members, may forfeit its right to act as the bargaining representative, be intended by the Court as referring only to the fact of the valid discharge of employees, then petitioner maintains that such action does not in fact constitute a valid distinction. If the aforesaid language be intended by the Court to mean that wrongful acts by the members of a union, whether involving discharge of such members or not, shall cause the union to forfeit its right to represent the employees on matters of collective bargaining, and that such is the distinction between the Fansteel and the instant case, then petitioner respectfully contends that such a conclusion by the Court is not in accord with the National Labor Relations Act or the decision of the Supreme Court. The Act places restrictions only on the activities of employers. An employer is not excused from its obligations to bargain with a union because of the misconduct of a union or its representatives or members.

In the case of *N.L.R.B.* v. *Remington Rand, Inc.*,[14] the Court said:

> "The conduct of a Union, like that of an employer, not only during the negotiations when there are any, but before there are, may be relevant in ascertaining whether the proposal to confer is genuine, or only part of the tactics of the fight. Nothing else can be material; though the Union may have misconducted itself, it has a locus poenitentiae: if it offers in good faith to

[14] 94 Fed. (2d) 862; cert. den. 1938, 304 U.S. 576.

treat, the employer may not refuse because of past sins."

The Circuit Court of Appeals stated in its decision:

> "It appears in the case before us that the loss of a majority was due to a voluntary quitting on the part of certain employees of Respondent. From the Board's treatment of Respondent's argument in this respect, however, it would seem that it is of the view that the loss in majority may be traced to the refusal to bargain with the Union on June 12, 1941." [15]

It is respectfully submitted that it is the function of the Court to determine whether the findings of the Board rest upon substantial evidence and that it is improper and prejudicial to petitioner for the Court to supply findings which have not been made.

It is respectfully submitted that nowhere in the Board's decision is there a finding that the loss of majority was due to any unfair labor practices on the part of petitioner, and it is submitted that the petitioner is entitled to the Board's judgment on this matter supported by substantial evidence and that, where such finding was not made by the Board, it cannot be supplied by the Court. From the very fact that such a finding has been omitted it would appear that the Board did not believe such a finding would have been warranted on the record.

Moreover, it is interesting to note that substantially such a finding was made by the Board in the Fansteel case and decided against by the Supreme Court. In its decision the Board stated:

> "The Respondent cannot be heard to assert that on March 3 and 5 no longer was the Union the represen-

[15] Certified Copy of Appendix, p. 126.

tative of the majority of the employees. The evidence does not show that any of the Union members had resigned by that time, and any defections from the Union's representative authority implied in the return to work of some of the members is clearly ascribed to the unlawful conduct of the Respondent in continuing to rebuff all efforts of the Union to meet and settle the strike. Any such defections may accordingly be disregarded." [16]

The Circuit Court of Appeals in its opinion in the case at bar stated that respondent's dilatory tactics, its refusal to recognize the Union and other actions deprived the Union of the opportunity of strengthening its organization. It is submitted that the Board made no such finding and the Court cannot supply it for the Board. It is called to the attention of the Court that the same reasoning could have been applied with more merit to the Fansteel case, for there the strike which resulted in the discharge of the employees was caused by the unfair labor practices of the employer. In fact, the entire language of the Circuit Court of Appeals in the instant case with respect to findings which it said the Board might reasonably have made, and which petitioner contends were not made, could be applied with equal merit to the Fansteel case.

The Circuit Court of Appeals in the case at bar places great reliance on the Lorillard case.[17]

In its opinion in the instant case, in discussing the Karp case [18] the Court stated:

"But it appears from the Lorillard case that the only consideration which the Board gave to the pos-

[16] 5 N.L.R.B. 930, 945, 946.

[17] *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512; 62 S. Ct. 397.

[18] *N.L.R.B.* v. *Karp Metal Products Co. Inc.*, 134 Fed. (2d) 954 (C.C.A. 2d, 1943).

sible shift in the majority was to say that it would ignore such a shift in order to effectuate the policies of the Act." [19]

It is respectfully contended that the Board did much more than that. The Board found in the Lorillard case as follows:

> "The necessary delays incident to the adjudication of a dispute have postponed the Board's Order until a time considerably subsequent to the original wrongful refusal to bargain. The refusal to bargain collectively disrupts the morale of the men, has a deterring effect upon the organizational activity of the Union and a discouraging influence on members already gained which tends to induce them to drop from the ranks." [20]

The Supreme Court recognized the fact that such finding had been made in its opinion in the Lorillard case as quoted in the opinion of the Circuit Court of Appeals in the instant case: "The Board had considered the effect of a possible shift in membership . . ." [21]

Such findings are not present in the instant case. In addition it must be remembered that in the Lorillard case the loss of majority was never shown on the record and that the alleged loss was brought to the attention of the Board after the hearing had closed and after the Trial Examiner had rendered his intermediate report, which in itself differentiates it substantially from the instant case. It is submitted that in the instant case, when the Court discusses the possible accessions in membership from new or

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[19] Certified Copy of Appendix, p. 125.
[20] 16 N.L.R.B. 684, 700.
[21] Same as note 19, *supra*.

old employees, the Court is merely speculating on conclusions that the Board might have drawn, but did not, for reasons known only to it.

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